United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1886

United States Court of Appeals

For the Second Circuit

MERCU-RAY INDUSTRIES, INC. and
JAMES SCOTT KREAGER,

Plaintiffs-Appellants,

v.

BRISTOL-MYERS COMPANY, CLAIROL INCORPORATED
and MICHAEL S. SCHWARTZ,

Defendants-Appellees.

BRIEF OF DEFENDANTS-APPELLEES BRISTOL-MYERS COMPANY AND CLAIROL INCORPORATED

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BRIEF OF DEFENDANTS-APPELL .ES BRISTOL-MYERS COMPANY AND CLAIROL INCORPORATED

Issues Presented for Review

1. Did the lower court err in holding that a sole shareholder's purported assignment to himself of his wholly-owned corporation's alleged claims against defendants, in order to avoid the federal law that a corporation cannot appear *pro se,* was ineffective for that purpose, and that the corporation's claims should be dismissed for its failure to appear through counsel?

2. Did the lower court err in dismissing, for lack of standing, the claim asserted by a sole shareholder for alleged antitrust violations directed against his corporation?

3. Did the lower court err in dismissing a pendant claim, denominated as "fraud and deceit", and which reasserted the antitrust claims, for failure to state with

particularity the circumstances constituting the alleged fraud?

4. Should this Court, in the interests of justice and to protect defendants and their privies from further harassment and vexatious litigation, enter an order enjoining plaintiffs from instituting further judicial proceedings against defendants and those in privity with them?

Statement of Facts

The individual plaintiff, James Scott Kreager, is no stranger to this Court and to the District Court below. On May 13, 1974, this Court affirmed a defendants' judgment entered after a jury trial in an action brought by Mercu-ray Industries, Inc., a corporate shell wholly-owned by Mr. Kreager. At the same time, the Court affirmed an order dismissing, on the grounds of *res judicata,* another action brought by Mr. Kreager, individually, after the said judgment was entered and naming basically the same defendants. Both complaints alleged identical violations of the Sherman Act and pendant claims of fraud and deceit against General Electric, International Telephone and Telegraph, Toshiba and various of their officers, directors and employees. In each case it was asserted that the defendants had conspired to suppress a patented device owned by Mercu-ray.*

One month after the District Court's dismissal of the first *G.E.* action (68 Civ. 944) and the filing (on the same day) of the second identical *G.E.* action (73 Civ. 2836), Mr. Kreager filed, in the name of his corporation and himself, a third complaint, this time naming Bristol-Myers Company, its wholly-owned subsidiary Clairol Incorporated

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* *Kreager* v. *General Electric, et al.,* 497 F.2d 468 (2nd Cir. 1974). The first action demanded damages in the amount of $9,600,000; the second, $750,000,000.

and Michael Schwartz as defendants. The complaint alleged that defendants' violations of the antitrust laws prevented the corporate plaintiff from exploiting its patented device and deprived Mr. Kreager, as officer and sole shareholder thereof, of the profits from sales of said device. The complaint additionally alleged pendant claims denominated as "fraud and deceit", although they plainly were reassertions of the antitrust claims. Damages of 7.5 billion dollars were demanded.

By order dated September 28, 1973, the District Court (Duffy, J.) granted defendants' motion to dismiss Mr. Kreager's claims for lack of standing, with leave to replead. Defendants' motion to strike Mercu-ray's claims for failure to appear through counsel was denied, when, on the return day of the motion, an attorney appeared on its behalf.

However, shortly after an amended complaint was filed bearing that attorney's signature, he withdrew from both of the then-pending *G.E.* appeals and from the instant action in "an acrimonious dispute" with Mr. Kreager (Opinion, A. 5).

Defendants subsequently renewed their motion upon the same grounds. Immediately thereafter and in apparent response to defendants' motion, Mr. Kreager purported to take an assignment of his corporation's claims (although not its patent rights upon which those claims depend) in order that he might press them *pro se*. He then moved to change the title of the instant action to substitute himself in place of his corporation, relying upon the alleged assignment.

By memorandum and order dated June 25, 1974, Judge Duffy dismissed the amended complaint, holding that 1) the purported assignment was ineffective for the purpose of evading the federal policy against corporate *pro se* appearances, 2) Mr. Kreager lacked standing to assert

the indirect antitrust claim alleged in his own name and 3) the claim denominated "fraud and deceit" lacked the specificity required by FRCP 9(b).

This appeal was taken the day following the entry of the order dismissing the action. Mr. Kreager's subsequent motion to this Court to "change the title" was referred by the motion panel to the panel hearing the appeal by order dated July 24, 1974.

Concurrently with the service of his brief on appeal herein, Mr. Kreager, in his own name and appearing *pro se*, filed still a further complaint against Bristol-Myers Company in the District Court for the District of New Jersey, re-alleging essentially the identical facts and claims asserted herein.* On October 3, 1974, Judge Biunno ordered the action dismissed *sua sponte* as "frivolous and malicious." **

ARGUMENT

I.

The Court Should Not Permit the Strong Federal Policy Against *Pro Se* Appearances by Corporations to be Evaded by the Simple Expedient of Allowing the Corporate Plaintiff's Sole Shareholder to be Substituted for the Corporation So That He May Then Prosecute Its Claim *Pro Se*.

Mercu-ray Industries, Inc., is alleged to be an Ohio corporation, with an address consisting of a post office box at Gratiot, Ohio. As a corporation, it must appear through an attorney, *Shapiro, Bernstein & Co., Inc.* v. *Continental Record Co.*, 386 F.2d 426, 427 (2nd Cir. 1967).

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* Sharply escalated damages of twenty-five billion dollars were claimed in that suit!

** A copy of the opinion is annexed hereto for the Court's convenience.

See also, Simbraw, Inc. v. *U.S.*, 367 F.2d 373 (3rd Cir. 1966); *U.S.* v. *9.19 Acres of Land, Marquette Co., Mich.*, 416 F.2d 1244 (6th Cir. 1969); *In Re Highley*, 459 F.2d 554, 555 (9th Cir. 1972) and *Flora Construction Co.* v. *Fireman's Fund Insurance Company*, 307 F.2d 413 (10th Cir. 1962), *cert. denied*, 371 U.S. 950 (1963).*

Mr. Kreager apparently does not dispute the validity of the aforesaid rule, but rather relies on this Court's November 7, 1973 order in the *G.E.* cases that granted his motion to amend the caption to substitute himself for Mercu-ray and thereafter to prosecute the appeal *pro se.*

The grant of the motion, however, was expressly conditioned upon the right of the appellees therein "to contest the validity or effectiveness of the alleged assignment." For reasons of their own, none of the appellees acted upon that invitation (Inselbuch Affidavit, sworn to November 20, 1973; R. 23).

It thus appears that this Court, in conditionally granting the motion, sought adversary argument on the propriety thereof. It received none and so the order was permitted to stand. In short, the appellees in that case defaulted in offering the Court of Appeals any discussion of the underlying issue and, therefore, this Court appears not to have considered the matter in the depth which would give that order precedential significance. Additionally, the order was necessarily granted for purposes of that appeal only. Here, however, Mr. Kreager is attempting to conduct the entire action *pro se.*

Judge Duffy held that the strong federal policy behind the rule disallowing corporations from appearing *pro se* cannot be thwarted by the simple expedient of allowing a corporation's only stockholder to have its rights assigned

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* In *Ashley-Cooper Sales Services* v. *Brentwood Mfg. Co.*, 168 F. Supp. 742 (D. Md. 1958) the Court comprehensively reviewed the cases supporting the rule, tracing it as far back as 1824.

over to him so that he may thereafter conduct its litigation. Accordingly, he dismissed Counts I and II of the amended complaint, both of which were alleged in the corporation's name.

The soundness of that ruling could not be better demonstrated than here where the amended complaint purports to allege (although not without considerable discursiveness, hyperbole and confusion) complex factual and legal issues under the antitrust laws, intermixed with accusations of criminal conduct on the part of a variety of individuals. Mr. Kreager has already made numerous meritless motions, among them, 1) to punish three attorneys for contempt—foully defaming them in his papers; and 2) to have the designated judge disqualify himself for denying the contempt motion and for allowing plaintiffs' attorney to withdraw. Mr. Kreager has also served shotgun notices to take depositions, naming, among many others, five members of defendant Bristol-Myers' Board of Directors, the Chairman of the Board of First National City Bank, the Chairman and Vice-Chairman of General Electric, the law firm and lead trial counsel for General Electric, and Mercu-ray's former counsel. Moreover, as Judge Biunno noted in his opinion dismissing Mr. Kreager's latest lawsuit in New Jersey, Mr. Kreager had noticed some forty-two persons for deposition in that suit even before the time permitted by the Federal Rules.

One must contemplate with deep foreboding the subpoena powers of the federal courts being entrusted to his hands.

Support for the ruling below may be found in the public policy underlying FRCP 11. It serves the salutory purpose of screening out baseless claims and unsupportable or scandalous allegations in pleadings by requiring that they be signed by a member of the bar, with counsel's signature certifying to the existence of good grounds for making the allegations therein, *Freeman* v. *Kirby,* 27 F.R.D. 395

(S.D.N.Y. 1961) and *Heart Disease Research Foundation* v. *General Motors Corp.*, 15 F.R. Serv. 2d 1517 (S.D.N.Y.), *aff'd*, 463 F.2d 98 (2nd Cir. 1972).

A *pro se* non-lawyer is not similarly bound. Neither is he obliged to adhere to the ethical precepts enforced by the State Court having supervisory powers over the members of its bar. Shielded against liability for libel by the privilege which attaches to pleadings and not being subject to the above constraints upon attorneys, such a class of litigants may seriously obstruct and clog the courts with meritless claims, improper procedures * and, as here, personal opprobrium.**

The sifting function that the bar performs in rejecting baseless claims is an essential aid to the administration of justice. It is significant that the plaintiff corporation's claim of damage, trebled in the amount of seven and one-half billion dollars, has found not a single champion among the vast numbers of practicing lawyers in this city—with the one exception of counsel who withdrew shortly after entering an appearance. (See also Judge Biunno's discussion of the point in his October 3, 1974 decision.)

The lower court noted that although there are many cases upholding the federal policy of requiring corpora-

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* One example being Mr. Kreager's motion to this Court for an order requiring defendants to raise issues of *res judicata* on this appeal, on pain of estoppel. Said motion was denied by this Court on July 24, 1974, without prejudice to any party raising such matters before the panel that hears this appeal. The motion is so lacking in procedural and substantive merit as almost to defy response. No such matters were raised before the District Court, and there is nothing in the record before this Court relating to such issue. Moreover, that issue (collateral estoppel, more accurately) would require preparation of enormous magnitude, the bulk of which would be an extended analysis of the elaborate *G.E.* record.

** In addition to the personal attacks noted above, Mr. Kreager has repeatedly charged in his brief to this Court that numerous members of the judiciary are guilty of "major conflicts of interest" and abuses of power.

tions to appear through counsel, there is surprisingly little direct precedent on the issue of whether or not that policy may be evaded by an assignment of the claim to a non-lawyer willing to become its litigator. Closest in point is *Heiskell* v. *Mozie*, 82 F.2d 861 (C.A.D.C. 1936), where the Court considered the propriety of a *pro se* appearance by a landlord's agent in a suit to evict a tenant who had defaulted in rental payments. In holding against that appearance, the Court looked to 28 U.S.C. § 394 (now 28 U.S.C. § 1654):

> "Section 272 of the Judicial Code, 28 U.S.C.A. § 394 (Rev. St. § 747) provides that:
>
> > 'In all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein.'
>
> "We think the words 'the parties,' as used in the statute, mean the parties in interest—the real, beneficial owners of the claims asserted in the suit, and by implication that it excludes agents and attorneys in fact and confines the representation, where the party whose rights are actually involved does not appear in person, to attorneys and counselors at law. It cannot be doubted, we think, that an assignment of a claim against another, made solely for the purpose of permitting the assignee—not an attorney—to conduct the litigation in proper person, would be colorable only and, therefore, insufficient to accomplish the purpose; and this, for the reason that such an assignment would transfer only the naked legal title or, perhaps more accurately, no more than an agency—a power without an interest;—and in such case there would be lacking that element of

personal interest which alone permits the management of an action at law in a court by some one other than an attorney at law.

* * *

"... No more can a corporation appear in proper person. The rule in these respects is neither arbitrary nor unreasonable. It arises out of the necessity, in the proper administration of justice, of having legal proceedings carried on according to the rules of law and the practice of courts and by those charged with the responsibility of legal knowledge and professional duty.

"Petitioner is not an attorney at law, nor is he the real party in interest, and hence had no standing to commence or to prosecute the action.

"The rules for admission to practice law in the courts of the District of Columbia require the applicant to submit to an examination to test not only his knowledge and ability, but also his honesty and integrity, and the purpose behind these requirements is the protection of the public and the courts from the consequences of ignorance or venality. The same rules apply, for the same purpose, to the practice of medicine and other learned professions. The tendency is and ought to be to strengthen rather than to weaken them." P. 863.

A respected commentator has dealt with various of the devices used to enable one person to sue in another's behalf:

"It has often been argued that an attorney in fact, or an agent for the sole purpose of suit, is a real party in interest. The Courts however, have uniformly denied the right in him to sue . . . as a real party in interest. . . ."

Moore, 3A Federal Practice, § 17.10 at p. 401 (2nd Ed. 1970).

Citing *Heiskell, supra,* with approval, the Third Circuit denied a *pro se* appearance on behalf of a corporation by its president:

> "Judge Nealon in his sound District Court opinion in this appeal rightly points out that the confusion that has resulted in this case from pleadings awkwardly drafted, and motions inarticulately presented likewise demonstrates the wisdom of such a policy." P. 375.
>
> *Simbraw, Inc.* v. *U.S.,* 367 F.2d 373 (1966).

In *Archie* v. *Shell Oil Co.,* 110 F. Supp. 542 (E.D. La. 1953), *aff'd,* 210 F.2d 653 (5th Cir. 1954) a property owner conveyed her interest in a cause of action to another for the purpose of allowing him to sue thereon as plaintiff. The Court dismissed his complaint upon the ground that he was not the real party in interest.*

28 U.S.C. § 1654 and the numerous cases which have interpreted it as precluding a corporation from appearing without counsel will be set at naught if the same non-attorney who seeks unsuccessfully to appear on its behalf by appointment or agency may overcome his lack of qualification by the mere expedient of taking an assignment of the claim.**

Accordingly, the order below dismissing Counts I and II of the amended complaint should be affirmed. As Judge Duffy noted, antitrust cases require experienced, skilled counsel, a descriptive which hardly fits Mr. Kreager (A.

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* The federal statute and policy is, as the lower court noted, controlling. The judge, however, looked to state law and found it in conflict. Compare *Biggs* v. *Schwalge,* 341 Ill. App. 268, 93 N.E.2d 87 (1st Dist. 1950) with *Kamp* v. *In Sportswear, Inc.,* 39 A.D.2d 869, 332 N.Y.S.2d 983 (1st Dept. 1972).

** For reasons of his own (probably legal and tax considerations) Mr. Kreager chose to do business through a corporation. He should be bound by that election in litigating its claims.

11-12). Rather, he has demonstrated considerable capability for meritless, harassing procedures. Defendants and a host of third parties should not be further subjected to his playing at being a lawyer.

II.

The Order Below Dismissing Count III for Lack of Standing and Count IV for Non-Compliance with FRCP 9(b) Should be Affirmed.

The allegations of the original complaint and of the above-discussed Counts I and II of the amended complaint center about a certain device which was patented by Mercu-ray in the year 1957. Similarly, said patent was the focal point of the conspiracy alleged in the original complaint against General Electric, et al. (68 Civ. 944), the subsequent complaint in the name of Mr. Kreager individually against General Electric, et al. (73 Civ. 2836) and the further complaint against Bristol-Myers in the District Court of New Jersey (Civ. No. 74-1361).

A reading of Counts III and IV of the amended complaint reveals that those claims, too, are posited upon the patent owned by Mercu-ray and that Mr. Kreager's alleged interest and injury arise solely out of his relationship to that corporation, whether as stockholder, officer, director or employee.

Thus, both of said counts incorporate the first 25 paragraphs which set forth the said patent ownership and allege the defendants' acts to defeat and impair that patent.

Paragraph 33 of the amended complaint makes it plain that Mr. Kreager's claimed injury relates to the benefits he would have received from his corporation as a stockholder and employee but for the alleged acts of the defendants.

Paragraph 34 generally alleges that he was prevented from conducting further research, but, as amplified by paragraphs 33, 35 and 38, it is clear that such allegation relates to an injury to his corporation which resulted in indirect injury to him.

Paragraph 36 is similarly devoid of any allegation as to how the defendants' alleged acts affected him in his personal capacity. Indeed, the entire paragraph reaffirms that his claimed injury derives from the patented product of Mercu-ray.

Count IV of the amended complaint is virtually word-for-word the same as Count II of the original complaint which the lower court dismissed with leave to replead. A new party defendant was added, but that is of no significance to the continuing substantive inadequacy of the claim.

Although the Fourth Count is denominated as a claim for fraud and deceit, it plainly appears to be a reassertion of the antitrust claims contained in the prior counts. If analyzed as a claim for fraud, it founders upon the requirement of FRCP 9(b) that such matters be set forth with particularity, and the lower court so held.

In sum, nowhere in Counts III or IV does Mr. Kreager allege the ownership of a personal legal interest, protectible in law, with which the defendants' alleged acts interfered. Accordingly, the dismissal of those counts should be affirmed. A corporate shareholder, officer or employee has no separate standing to sue for injuries allegedly suffered by the corporation. *Kreager* v. *General Electric, et al.*, 497 F.2d 468 (2nd Cir. 1974); *Bookout* v. *Schine Chain Theatres, Inc.*, 253 F.2d 292 (2nd Cir. 1958); *Westmoreland Asbestos Co.* v. *Johns-Manville Corp.*, 30 F. Supp. 389 (S.D.N.Y. 1939), *aff'd*, 113 F.2d 114 (2nd Cir. 1940); *Kauffman* v. *Dreyfus Fund, Inc.*, 434 F.2d 727 (3rd Cir. 1970); *Ash* v. *International Business Machines, Inc.*, 353 F.2d 491 (3rd Cir. 1965); *Walker Dist. Co.* v. *Lucky Lager Brewing Co.*, 323 F.2d 1 (9th Cir.

1963); *Reibert* v. *Atlantic Richfield Co.*, 471 F.2d 727 (10th Cir. 1973), *cert. denied*, 93 S. Ct. 1900 (1973) and *Fleischer* v. *A.A.P., Inc.*, 180 F. Supp. 717 (S.D.N.Y. 1959).

This Court has shown little patience with extravagant charges of antitrust violation which are improperly pleaded after an opportunity for correction is allowed. In *Heart Disease Research Foundation, et al.* v. *General Motors Corp.*, 463 F.2d 98 (2nd Cir. 1972) [brought, incidentally, by the same attorney who represented the plaintiff corporation in the first case against General Electric, 68 Civ. 944], the Court affirmed a dismissal, without leave to replead, where the first amended complaint failed to cure the inadequacies of the original pleading.

The amount of judicial time already consumed by Mr. Kreager's unsupportable claims has been enormous. He should not be permitted to impose further upon the courts and those unlucky enough to come within his sights.

> ". . . there comes a time when litigants with legitimate controversies are entitled to claim the time and energies of the court, as against groundless, repeated proceedings by incompetent laymen who file matters and calendar them as a sounding board for fancied grievances, forcing parties to appear repeatedly, and consuming an immeasurable amount of the time of the court and other legitimate litigants in listening to rambling and unintelligible statements."
>
> *Deem* v. *Aero Mayflower Transit Co.*, 24 F.R.D. 16, 18 (S.D. Cal. 1959).

The order appealed from should be affirmed and the amended complaint dismissed with prejudice.

III.

In the Interests of Justice and to Avoid Further Harassment and Needless Expense, an Order of Permanent Injunction Should Issue Preventing Mr. Kreager and His Corporation from Instituting Further Litigation Against the Defendants and Their Privies Based on the Matters Alleged in the Amended Complaint Herein.

Mr. Kreager has now had *four* bites at the cherry, the only difference among them being that the parties defendant have been juggled and the ante has been raised from nine million to twenty-five billion dollars. Each action has in turn been dismissed: the latest as "frivolous and malicious."

The federal courts have not countenanced such gamesmanship with judicial process. They have repeatedly held, in factual circumstances less compelling than those herein, that a line will be drawn, and repetitious litigation ended, either pursuant to the All-Writs Act (28 U.S.C. § 1651) or as this Court put it, in "the exercise of their inherent power over their own process, to prevent abuses, oppression and injustice." *Parker* v. *Columbia Broadcasting System*, 320 F.2d 937, 938 (1963).

Accordingly, defendants respectfully request that an order issue restraining Mr. Kreager and Mercu-ray from instituting, in any court, any further proceedings against defendants and their privies based on the matters alleged in the amended complaint herein. *Gambocz* v. *Yelencsics*, 468 F.2d 837, 842 (3rd Cir. 1972); *Ruderer* v. *United States*, 462 F.2d 897 (8th Cir. 1972); *Kinnear-Weed Corp.* v. *Humble Oil & Refining Co.*, 441 F.2d 631, 637 (5th Cir. 1971); *Rudnicki* v. *McCormack*, 210 F. Supp. 905 (D.R.I. 1962), *app. dism.*, *Rudnicki* v. *Cox*, 372 U.S. 226 (1963); *Pollack* v. *Asbury*, 14 F.R.D. 454 (S.D.N.Y. 1953).*

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* The latter two decisions cited with approval by this Court in the *Parker* case, *supra.*

CONCLUSION

The order appealed from should be affirmed and the amended complaint dismissed with prejudice.

An order restraining plaintiffs from instituting further judicial proceedings against defendants and those in privity with them should be entered together with costs and disbursements to the defendants-appellees.

Dated: New York, New York
October 16, 1974

Respectfully submitted,

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Attachment

U.S. DISTRICT COURT—DISTRICT OF NEW JERSEY

CIVIL No. 74-1361

—o—

JAMES SCOTT KREAGER,

Plaintiff,

vs.

BRISTOL-MYERS COMPANY,

Defendant.

—o—

MEMO, OPINION AND ORDER

Kreager has applied for leave to proceed *in forma pauperis,* to have counsel appointed for him (with the expense paid for by the government), and for reimbursement by the government of all expenses incurred by him, or to be incurred, in the prosecution of the case. The application is dealt with under F.R. Civ. P. 78, without oral argument.

Kreager swears that in the years 1968 through 1973, his adjusted reportable gross income from all sources averaged about $140 per week, aside from periods when he received unemployment benefits. He swears that he has been unemployed since about March 8, 1974.

From this representation, scantly though it be, the court is satisfied that Kreager is presently unable to pay the costs and fees that would be required to prosecute the suit, or to give security therefor. 28 U.S.C. § 1915(a). He will be allowed to prosecute the case *in forma pauperis.*

The request to appoint counsel must be denied. While 28 U.S.C. 1915(d) authorizes the court to request an attorney to represent him, Kreager's affidavit discloses

that he has consulted more than 40 lawyers in Newark, N.J., ranging from large firms to individual practitioners, and that all told him it was practically impossible to undertake a case of this kind on a contingency basis. The court also notes that while an attorney may advance or guarantee the costs and expenses of litigation for a client unable to do so, the ultimate liability for such costs and expenses must be that of the client, regardless of the result. *Code of Professional Responsibility,* EC 5-8. Kreager swears he was told by a law professor who also practices with a firm that at least $75,000 would need to be advanced to prosecute his suit.

The court is unaware of any lawyer ready, able and willing to undertake this individual responsibility, and the statute provides no authority for ordering the government to pay the expense of Kreager's lawyer, much less his fees.

The same result is reached in respect to the request to order the government to pay the expenses of litigation. The statute is limited to relieving the party from prepayment of fees and costs to the clerk and to the U.S. Marshal. That request is accordingly denied.

A review of the complaint, as well as Kreager's affidavit, discloses that the suit here is essentially the same as two earlier actions he prosecuted in the Southern District of New York.

The first of these, brought in the name of his wholly-owned corporation, Mercu-Ray Industries, Inc., proceeded to trial and resulted in a verdict and judgment in favor of defendants. Immediately on the dismissal of the first action, a second one was filed on essentially the same claim, and was dismissed on the grounds of *res judicata.* Both judgments were affirmed on appeal, 497 F.2d 468 (C.A. 2, 1974). A review of that opinion discloses that the present suit reasserts essentially the same claim, as well as a number of broad charges that witnesses in the New York trial committed perjury, or that various persons conspired with them to that end. Kreager's affidavit also discloses

that both he and Mercu-Ray filed another suit against Bristol-Myers in the Southern District of New York (Docket 73-3225), which he says was dismissed and is now on appeal before the Court of Appeals for the Second Circuit.

A review of the complaint, the affidavit, and the opinion at 497 F.2d 468 (CA 2 1974) satisfies the court that the action is both frivolous and malicious. Kreager is not entitled to repeatedly relitigate the same claim, moving from district to district, adding or dropping defendants. Everyone is entitled to his day in court, but Kreager has already had his, and the jury found against him.

The action is accordingly dismissed as frivolous and malicious, pursuant to 28 U.S.C. 1915(d).
So Ordered.

October 3, 1974

s/ VINCENT P. BIUNNO
U.S.D.J.

Supplemental Note

Since the preparation of the foregoing, the court has received a proposed order to show cause from defendant's counsel, seeking to stay discovery noticed by Kreager pending the preparation and filing of various motions. It appears that Kreager noticed depositions to begin October 7, 1974, before the required 30 day waiting period had expired, for some 42 witnesses.

In view of the foregoing dismissal, the application for order to show cause is moot and is denied.
So Ordered.

October 3, 1974

s/ VINCENT P. BIUNNO
U.S.D.J.

Original to Clerk

xc: James Scott Kreager, Pro Se
Hannoch, Weissman, Stern & Besser

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

MAUREEN MC CONNELL, being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 302 East 88th Street, New York, New York. On October 18, 1974, deponent served the within Defendants-Appellees' brief upon James Scott Kreager, plaintiff pro se in this action, at 350 East 30th Street, Apt. 1E, New York, New York 10016, the address designated by Mr. Kreager for that purpose by depositing two true copies of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Maureen M Connell
Maureen Mc Connell

Sworn to before me this
18th day of October, 1974.

Virginia Odian
Notary Public

VIRGINIA ODIAN
Notary Public, State of New York
No. 41-4520005
Qualified in Queens County
Commission Expires March 30, 1976